

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

JULIA C. DUDLEY, CLERK
BY: s/ K. DOTSON
DEPUTY CLERK

JAMES A. HEGEDUS, et al.,)	
Plaintiffs,)	Civil Action No. 5:17-cv-00053
)	
v.)	<u>REPORT & RECOMMENDATION</u>
)	
NATIONSTAR MORTGAGE LLC, et al.,)	By: Joel C. Hoppe
Defendants.)	United States Magistrate Judge

Plaintiffs James and Virginia Hegedus (“Plaintiffs”), appearing pro se, brought this action against Defendants Nationstar Mortgage LLC (“Nationstar”) and Daniel T. Conway, alleging misconduct relating to the servicing and foreclosure of a mortgage on a residence in Sussex County, Delaware, owned by Plaintiffs. Pending before the Court are motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure filed by Nationstar, ECF No. 6, and Conway, ECF No. 10. These motions are before me by referral under 28 U.S.C. § 636(b)(1)(B). ECF No. 5. All parties have fully briefed the issues, I have heard oral argument, and the motions are ripe for decision. After considering the pleadings and supporting materials, the parties’ briefs and oral arguments, and the applicable law, I find that Conway’s motion should be granted in its entirety and that Nationstar’s motion should be granted in part and denied in part.

I. Background

A. *The Prior Case*

This is Plaintiffs’ second action in this Court complaining of Nationstar’s servicing activities relating to a mortgage loan they received from First Horizon Home Loans (“First Horizon”) in 2006, and for which they began making payments to Nationstar in 2011. In their first action, Plaintiffs complained of Nationstar having engaged in what they characterized as deceptive and illegal practices, culminating with Nationstar placing them in default. *See* Compl.,

Hegedus v. Nationstar Mortg., LLC, No. 5:16cv1, ECF No. 1 (W.D. Va. Jan. 4, 2016)

[hereinafter “*Hegedus I*”]. Nationstar moved to dismiss all claims under Rule 12(b)(6), and following oral argument, I issued a report and recommendation (“R&R”), recommending dismissal of Plaintiffs’ complaint. R. & R., *Hegedus I*, ECF No. 26 (W.D. Va. June 15, 2016).

The R&R first noted that Plaintiffs’ claims fell into the following general categories:

(1) alleged misrepresentations by Nationstar as to the identity of the owner of the mortgage; (2) alleged misrepresentations by Nationstar as to its status as a mortgage servicer, mortgagee, or debt collector; (3) alleged misrepresentations as to the status of the mortgage note; (4) failure to provide Plaintiffs with account statements and respond to Plaintiffs’ written requests for information; and (5) alleged mishandling of mortgage payments, including the refusal to accept full payments, wrongfully placing portions of payments in escrow, wrongfully assessing late fees and other charges, and “manufacturing” a default.

Id. at 2; *see also id.* at 4–7 (describing the specific acts of alleged wrongdoing in Plaintiffs’ complaint).

Turning to the merits of Plaintiffs’ claims, I found that they had no basis for objecting to the assignment of the note, mortgage, or servicing rights, as such an assignment was allowed under Virginia law, Plaintiffs were without standing to challenge it, and the assignment did not extinguish their obligation or limit Nationstar’s ability to effect a default and accelerate payments. *Id.* at 9. I then considered Plaintiffs’ federal claims, which were brought under the Truth in Lending Act (“TILA”), 15 U.S.C. §§ 1601–1667f; the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692–1692p; and the Real Estate Settlement Practices Act (“RESPA”), 12 U.S.C. §§ 2601–2610, 2614–2617. I found that all of Plaintiffs’ claims under TILA, and all but one of their claims under FDCPA, were barred by the respective statutes of limitations. R. & R. 10. The remaining alleged FDCPA violation was stated too vaguely to support a claim for relief. *Id.* I also found Plaintiffs’ claims under RESPA to be meritless, as they

failed to allege pecuniary loss from any of Nationstar's purported violations and did not show that these violations fell within the ambit of that statute. *Id.* at 10–12.

Finally, I addressed Plaintiffs' common-law tort claims. Noting that the complaint was confusingly and ambiguously written, I found that Plaintiffs seemed to assert claims for fraud, intentional infliction of emotional distress, and unjust enrichment. *Id.* at 4, 12–13. Evaluating these claims under Virginia law, I determined that Plaintiffs did not state a claim for fraud because they never alleged detrimental reliance on any misrepresentation or material omission and because Nationstar's handling of their account was controlled by the mortgage and promissory note. *Id.* at 12–13. The claim for unjust enrichment was likewise unsupportable because the parties' relationship was governed by a written agreement. *Id.* at 13. Meanwhile, I found that Plaintiffs' allegations did not come close to the level of severity necessary to state a claim for intentional infliction of emotional distress. *Id.* Accordingly, I recommended that the Honorable Michael F. Urbanski, the presiding District Judge, dismiss with prejudice "all claims that [were] barred by the statute of limitations; all claims challenging the assignment, pooling, or securitization of Plaintiffs' mortgage; and all claims for unjust enrichment and intentional infliction of emotional distress." *Id.* at 14. I further recommended dismissing without prejudice Plaintiff's remaining federal claims and their claim for common-law fraud. *Id.*

Plaintiffs lodged numerous objections to the R&R. *See* Pls.' Objs., *Hegedus I*, ECF No. 30 (W.D. Va. July 12, 2016). Judge Urbanski took up these objections in a memorandum opinion, in which he adopted the R&R in full and dismissed Plaintiffs' complaint. Mem. Op., *Hegedus I*, ECF No. 32 (W.D. Va. Sept. 29, 2016). As to Plaintiffs' common-law claims, he noted that Plaintiffs did not object to the R&R's finding that they failed to state a claim for unjust enrichment (specifically that such a claim would be precluded by a contractual relationship

between Plaintiffs and Nationstar) or for intentional infliction of emotional distress. *Id.* at 11 & n.11. He concurred with the R&R's assessment that Plaintiffs did not state a claim for fraud because they never alleged reasonable reliance on purportedly fraudulent statements. *Id.* at 10–11. He elaborated in a footnote that a claim for fraud might also be unavailable because Nationstar acted pursuant to the terms of the mortgage, but he observed that this was somewhat complicated because Plaintiffs contracted with their lender, First Horizon, and not with Nationstar. *Id.* at 11 n.10. Accordingly, Judge Urbanski declined to “conclusively determine whether the absence of direct privity of contract between plaintiffs and Nationstar would permit a properly pleaded fraud claim to go forward,” as the element of reliance was not adequately pled. *Id.* He then overruled Plaintiffs' objections and affirmed the findings of the R&R as to the federal claims. *Id.* at 12–16.

Finally, Judge Urbanski turned to Plaintiffs' objections concerning particular factual findings in the R&R. Because Plaintiffs had attached a copy of an escrow waiver to their objections (the first time in the litigation they had produced this document), he revisited the R&R's finding that Nationstar was entitled to place funds into escrow to pay for local taxes. *Id.* at 16–17. He noted that the escrow waiver limited Nationstar's ability to create an escrow account and instead provided that Plaintiffs would “pay the escrow items,” such as taxes and insurance, when they became due. *Id.* at 16 (brackets omitted). He further noted, however, that the waiver was not absolute, as the waiver and the mortgage allowed Nationstar to establish an escrow account to pay for these items if Plaintiffs failed to do so on time, after which Plaintiffs would be obligated to reimburse Nationstar. *Id.* at 17. Because Plaintiffs had not alleged that they paid \$140.17 in local taxes on time, their complaint failed to show that Nationstar was wrong to place this amount in escrow. *Id.* at 17 & n.15. Moreover, Judge Urbanski noted that even if

Plaintiffs had established that Nationstar’s creation of an escrow account was wrongful, “an action for conversion would likely be more appropriate than the fraud and unjust enrichment claims [they] chose to pursue.” *Id.* at 17 n.16. Ultimately, he disposed of the matter in an order entered on September 29, 2016, granting Nationstar’s motion to dismiss; dismissing without prejudice Plaintiffs’ claims for fraud, their claims under RESPA, and one count under FDCPA; and dismissing with prejudice the remaining FDCPA claims, all claims under TILA, and the claims for unjust enrichment and intentional infliction of emotional distress. Order, *Hegedus I*, ECF No. 33 (W.D. Va. Sept. 29, 2016). Plaintiffs did not file an amended complaint or notice of appeal, and no other action was taken in that matter.

B. The Present Case

1. Allegations of Fact

When assessing a motion to dismiss, courts must view all well-pled facts in the complaint in the light most favorable to the plaintiff. *Philips v. Pitt Cty. Mem’l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). In recognition of Plaintiffs’ pro se status and the court’s obligation to hold their pleadings to “less stringent standards than formal pleadings drafted by lawyers,” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)), the Court will also consider facts presented in their opposition briefs, *Shomo v. Apple, Inc.*, No. 7:14cv40, 2015 WL 777620, at *2 (W.D. Va. Feb. 24, 2015) (considering “both the complaint and the factual allegations in Shomo’s response to the motion to dismiss in determining whether his claims can survive dismissal”); *Christmas v. Arc of the Piedmont, Inc.*, No. 3:12cv8, 2012 WL 2905584, at *1 (W.D. Va. July 16, 2012) (accepting as true facts from a pro se plaintiff’s complaint and brief in opposition to decide a motion to dismiss), and any attached relevant documents, *see Witthohn v. Fed. Ins. Co.*, 164 F. App’x 395, 396 (4th Cir.

2006) (per curiam) (explaining that “a court may consider . . . documents central to plaintiff’s claim . . . so long as the authenticity of these documents is not disputed” without converting the motion to dismiss into a motion for summary judgment). Furthermore, “[w]hen the plaintiff attaches or incorporates a document upon which his claim is based, or when the complaint otherwise shows that the plaintiff has adopted the contents of the document,” the court will credit the contents of the document over contradictory allegations in the complaint. *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 167 (4th Cir. 2016).

Plaintiffs filed this action on May 30, 2017. Compl., ECF No. 1. As in their first action, they do not plead their claims with much specificity, instead employing a scattershot approach. As best as can be gathered from their Complaint, their pertinent allegations of fact are as follows: In July 2013, approximately two years after having taken over servicing of Plaintiffs’ loan, Nationstar made a payment¹ of \$140.17 for property tax, an amount which Plaintiffs had already paid. *Id.* at 4. When Plaintiffs learned that Nationstar had done this, they sent a reimbursement check to Nationstar for the amount of the tax, along with a copy of the check they had earlier sent for payment of the tax. *Id.*; *see also* Compl. Ex. C, ECF No. 1-3. Nationstar did not acknowledge receipt, but did cash Plaintiffs’ reimbursement check. Compl. 4.

In December 2013, Nationstar “converted Plaintiffs’ full periodic payment into a suspense account” without informing them. *Id.* at 5. Over the next seven months, Plaintiffs continued to tender full periodic payments. *Id.* Nationstar accepted these payments, but assessed late fees, which Plaintiffs allege flowed from their December payment having been placed in suspense. *Id.* Plaintiffs claim that they were not made aware that these fees had been assessed

¹ Plaintiffs at times make conflicting statements as to whether Nationstar actually made this payment, but they do claim that they were informed by the Sussex County (Delaware) Treasury that Nationstar made the payment, that Nationstar told them it made the payment, and that this amount was set off in an escrow account. *See* Compl. 4.

because Nationstar had stopped sending them monthly statements in early 2014. *Id.* at 5–6. In August 2014, Nationstar mailed Plaintiffs a check for \$700.11, which they believed may have been “converted” from their periodic payments and which they have never cashed. *Id.* at 6. They contend that this was the amount of “excess money” remaining in the suspense account after Nationstar “manufactured” a default. *Id.* at 9. Nationstar also returned Plaintiffs’ periodic payment check for August, and Plaintiffs, assuming that this was in error, tendered another check for the August payment to Nationstar. *Id.* at 6. Nationstar returned this second check as well, stating that the amount was insufficient to bring Plaintiffs’ account current. *Id.* Nationstar continued returning Plaintiffs’ monthly payments for the next seventeen months, which caused them to “accru[e] substantial amounts of interest and late fees.” *Id.*²

On July 8, 2015, Conway, on behalf of Nationstar, notified Plaintiffs that their loan had been found in default and the remaining payments accelerated. *Id.* at 12, 14; *see also* Compl. Ex. H, ECF No. 1-8. The notices were sent both to a Post Office Box in Staunton, Virginia (where Plaintiffs reside), and to the subject property in Delaware. Compl. Ex. H.³ In December 2015, Nationstar instituted a foreclosure action in Delaware, Compl. 14, which the parties have informed the Court is still ongoing. Conway served the foreclosure complaint on the Delaware residence, although Plaintiffs did not reside there at the time. *Id.* at 14–15. Plaintiffs contend that during the foreclosure litigation Conway submitted false evidence and pleadings to the Delaware court. *Id.* at 15. They most strenuously object to a notation in a docket entry for return of service of process on a tenant of the Delaware property, which described the tenant as a “cohabitor” of

² The Plaintiffs also describe apparent discrepancies in their accounts and other undisclosed disbursements made by Nationstar, *see* Compl. 13–14, but these alleged discrepancies are not explained with any clarity.

³ A validation notice stated that Plaintiffs’ outstanding debt as of July 10, 2015, was \$172,556.43. Compl. Ex. I, at 3, ECF No. 1-9. Another statement informed Plaintiffs that the total amount to pay the loan in full through July 31, 2015, was \$174,178.17. *Id.* at 4.

the Plaintiffs. *Id.* They also dispute the accuracy of a December 2016 statement Conway made to that court, in which he explained that Plaintiffs had earlier been pre-approved for a trial modification, but their tendered payment check had been rejected for insufficient funds, thus leading to a default on the trial modification. *See id.* at 15–16; *see also* Compl. Ex. M, ECF No. 1-13. Plaintiffs allege that they made this payment thinking that it was a regular monthly payment and that they did not know it had been allocated to a trial modification. Compl. 15–16.

Finally, Plaintiffs allege that in December 2016 and March 2017, Nationstar instructed State Farm, Plaintiffs’ homeowners insurer, to cancel Plaintiffs’ policy, refund amounts that Plaintiffs had paid, and replace those with payments from Nationstar. *Id.* at 9, 11–12. They contend that before Nationstar contacted State Farm there had been no lapse in their insurance coverage, *id.* at 9, and they complain that this contact has caused strain in their relationship with their insurer, *id.* at 12. Plaintiffs report that State Farm has since reinstated their coverage and returned Nationstar’s payments. *Id.* at 12.

2. *Claims and Defenses*

Against Nationstar, Plaintiffs bring a claim for conversion, relating to Nationstar placing funds in escrow, placing their December 2013 payment in suspense, and returning Plaintiffs’ monthly payments beginning in August 2014. *Id.* at 4–7, 17–18. They allege that Nationstar breached the mortgage agreement and the implied covenant of good faith by failing to apply Plaintiffs’ payments to the loan interest and principal pursuant to the terms of the agreement, creating an escrow account to pay for expenses in spite of Plaintiffs’ escrow waiver, finding Plaintiffs in default, and sending notice to multiple addresses in contravention of language in the mortgage agreement. *Id.* at 7–11, 18. They next claim that Nationstar tortiously interfered with their homeowners’ insurance contract by directing State Farm to return Plaintiffs’ premium

payments and instead accept payments from Nationstar. *Id.* at 11–12. Plaintiffs assert a claim for “falsification of business records” and for intentional infliction of emotional distress against Nationstar in relation to what they contend are discrepancies in Nationstar’s in-house accounting of their mortgage. *Id.* at 12–14, 19–20. Against Conway, they bring claims for defamation and professional misconduct (including violations of Rule 11 of the Federal Rules of Civil Procedure), resulting from his communications with Plaintiffs and his representations to the state court in the Delaware foreclosure action. *Id.* at 14–16, 20–21. Their Complaint is also peppered with other vague assertions of “manufacturing a default leading to an illegal foreclosure action,” elder abuse, abuse of process, malicious prosecution, and intentional infliction of emotional distress. *Id.* at 3, 19–20.

In support of its motion to dismiss, Nationstar asserts defenses of res judicata (claim preclusion) and collateral estoppel (issue preclusion),⁴ arguing that this entire matter was resolved when Plaintiffs’ first action was dismissed. Nationstar’s Br. in Supp. of Mot. to Dismiss 4–10, ECF No. 7 (“Nationstar Br.”). They also contend that Plaintiffs’ scattershot pleading approach violates Rule 8. *Id.* at 10–12. Finally, they argue that Plaintiffs’ claims for conversion, breach of contract, tortious interference with a contract, and intentional infliction of emotional distress fail as a matter of law. *Id.* at 12–17. Conway contends that Plaintiffs’ allegations against him are too conclusory to state a claim, notes that the foreclosure action in Delaware is still pending, and argues that this action merely amounts to a delay tactic by Plaintiffs to avoid foreclosure. Conway’s Br. in Supp. of Mot. to Dismiss 3–5, ECF No. 11 (“Conway Br.”). In his reply brief, Conway specifically addresses Plaintiffs’ claims for defamation and argues that his

⁴ Because the terms “res judicata” and “collateral estoppel” are often used interchangeably, I will use the terms “claim preclusion” to describe the foreclosure of an entire cause of action that was previously before the court, “issue preclusion” to describe the prior action’s resolution of particular questions of fact or law, and “res judicata” to describe the doctrine of preclusion as a whole. See 18 Charles Alan Wright, Arthur R. Miller, et al., *Federal Practice and Procedure* § 4402 (3d ed. 2017) (“Wright & Miller”).

statements were made in the course of a judicial proceeding and he is therefore protected by an absolute privilege against liability. Conway's Reply Br. in Supp. of Mot. to Dismiss 3–5, ECF No. 20 ("Conway Reply Br.").

II. Analysis

A. *Standard of Review*

In order to survive a motion to dismiss under Rule 12(b)(6), a complaint must "state[] a plausible claim for relief" that "permit[s] the court to infer more than the mere possibility of misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). In making this determination, the Court accepts as true all well-pled facts and construes those facts in the light most favorable to the plaintiff. *Philips*, 572 F.3d at 180. The Court need not accept legal conclusions, formulaic recitation of the elements of a cause of action, or "bare assertions devoid of further factual enhancements," however, as those are not well-pled facts for Rule 12(b)(6)'s purposes. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678).

Plaintiffs must plead enough facts to "nudge[] their claims across the line from conceivable to plausible," and a court should dismiss a claim for relief that is not "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Federal courts have an obligation to construe pro se pleadings liberally, so that any potentially valid claim can be fairly decided on its merits rather than the pro se litigant's legal acumen. *Rankin v. Appalachian Power Co.*, No. 6:14cv47, 2015 WL 412850, at *1 (W.D. Va. Jan. 30, 2015) (citing *Boag v. MacDougall*, 454 U.S. 364, 365 (1982)). Still, a pro se plaintiff must "allege facts that

state a cause of action, and district courts are not required ‘to conjure up questions never squarely presented to them.’” *Considder v. Medicare*, No. 3:09cv49, 2009 WL 9052195, at *1 (W.D. Va. Aug. 3, 2009) (quoting *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985)), *aff’d*, 373 F. App’x 341 (4th Cir. 2010).

B. Choice of Law

Before reaching the merits of the motions to dismiss, I must consider which laws to apply in evaluating the parties’ claims and defenses. First, it is necessary to determine whether state or federal law governs Nationstar’s res judicata argument.⁵ The Supreme Court has stated that in cases where the prior judgment was rendered by a federal court under diversity jurisdiction, courts should evaluate the preclusive effect of that judgment under the laws of the forum state unless the state law is incompatible with federal interests. *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508–09 (2001); *see also Q Int’l Courier, Inc. v. Smoak*, 441 F.3d 214, 218 (4th Cir. 2006). Where the prior federal court issued its judgment under federal question jurisdiction, the preclusive effect of that judgment should be assessed in accordance with the federal common law. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008).

Where the previous matter involved both federal and state claims, as is the case here, courts have reached mixed results on which body of law to apply. *Compare In re JPMorgan Chase Derivative Litig.*, 263 F. Supp. 2d 920, 930–31 (E.D. Cal. 2017) (“[F]ederal common law determines *Steinberg*’s [the prior case] preclusive effect because *Steinberg* addressed a federal question. That *Steinberg* also involved state law claims does not change this court’s conclusion because the *Steinberg* court considered those claims on the basis of supplemental jurisdiction only.”), *and Robinson v. City of Phoenix*, No. CV10-1044 PHX DGC, 2010 WL 4054167, at *2

⁵ In its brief, Nationstar cites to federal law on res judicata, whereas Plaintiffs cite to Virginia law; neither party addresses the choice-of-law issue directly, however.

(D. Ariz. Oct. 15, 2010) (applying federal preclusion law because the prior actions were “not diversity cases; they [were] federal question cases with supplemental jurisdiction of some state law claims”), and *In re Residential Capital, LLC*, 507 B.R. 477, 490 (Bankr. S.D.N.Y. 2014) (“When federal jurisdiction in a prior case is based on federal question jurisdiction, with the court exercising supplemental—not diversity—jurisdiction over the plaintiff’s remaining claims, federal preclusion doctrine applies.”), with *Ranir, LLC v. Dentek Oral Care, Inc.*, No. 1:09-CV-1056, 2010 WL 3222513, at *2 (W.D. Mich. Aug. 16, 2010) (“Because the prior Tennessee action can be characterized as either a federal question or a diversity action, the Court can, but is not required to, incorporate the rules of preclusion applied by the state courts in Tennessee.”).⁶

These cases could be read to suggest that state preclusion law may apply if the state claims in the first action could have been decided, independently of the federal questions, under diversity jurisdiction, while federal law would apply if the court were only able to take up the state claims pursuant to supplemental jurisdiction. Here, Plaintiffs alleged both federal question and diversity jurisdiction in their last complaint, *see* Compl. 1–2, *Hegedus I*, which could suggest that Virginia preclusion law should be applied as to Plaintiffs’ state law claims.

Nonetheless, the Court needs to consider all the effects of its prior judgment, up to and including whether that judgment precludes this action in its entirety. Piecemeal application of federal and state preclusion law would overly complicate this decision, and so the best course is to decide *res judicata* questions under one body of law. Because the last matter invoked federal questions and was decided pursuant to federal procedural standards, preclusion questions here should be governed by federal law. *See* Wright & Miller § 4472 (“[I]f state questions are decided

⁶ Other courts have avoided resolving the issue by finding that the state and federal rules were indistinguishable. *See Hall v. Greystar Mgmt. Servs., L.P.*, 193 F. Supp. 3d 522, 529 n.4 (D. Md. 2016); *Twersky v. Yeshiva Univ.*, 112 F. Supp. 3d 173, 179 (S.D.N.Y. 2015). I have not found any cases comparing the federal preclusion rules with Virginia’s rules, however.

as an incident of federal-question litigation, the clear right of federal courts to insist on their own preclusion rules as to the federal questions may carry over to include all questions in a uniform body of doctrine. A persuasive argument can be made in these terms that all preclusion consequences of any federal judgment in an action that rests in part on decision of federal questions should be measured by federal rules.” (footnotes omitted)).

Next, I must consider which law applies to whichever of Plaintiffs’ common-law claims are not precluded by the last action. A federal court exercising diversity jurisdiction or addressing state law claims under supplemental jurisdiction must apply the choice-of-law rules of the state in which it sits. *In re Merritt Dredging Co.*, 839 F.2d 203, 205 (4th Cir. 1988). For tort claims, Virginia applies the substantive law of “the place ‘the last event necessary to make an [actor] liable for an alleged tort takes place.’” *Ford Motor Co. v. Nat’l Indem. Co.*, 972 F. Supp. 2d 850, 856 (E.D. Va. 2013) (alteration in original) (quoting *Gen. Assurance of Am., Inc. v. Overby-Seawell Co.*, 533 F. App’x 200, 206 (4th Cir. 2013)). This rule looks to “the place where the wrongful act occurred, even when that place differs from the place where the effects of injury are felt.” *Milton v. IIT Research Inst.*, 138 F.3d 519, 522 (4th Cir. 1998).

Plaintiffs’ claims against Conway should be governed by Delaware law, as all his statements of which the Plaintiffs complain were made in conjunction with the foreclosure action in that state.⁷ See *Katz v. Odin, Feldman & Pittleman, P.C.*, 332 F. Supp. 2d 909, 914 n.4 (E.D. Va. 2004) (applying, in a defamation action, the law of the place in which the defamatory statement was published).

⁷ Plaintiffs make unclear allegations about correspondences sent by Conway from an address in Leesburg, Virginia, to both the subject property in Delaware and to their address in Staunton. Compl. 14. The crux of their objections, however, concern Conway’s representations to the Delaware court and the fact that he served process on the tenant of the Delaware residence. *Id.* at 14–16, 20–21.

The choice-of-law analysis for Plaintiffs' tort claims against Nationstar is complicated by the vague and incomplete nature of their allegations. For their conversion claim, which is based on Nationstar's mishandling of their payments, the most appropriate choice of applicable law appears to be that of Texas, where Nationstar does business and where Plaintiffs mailed their payments. *See* Compl. 2; *id.* at Ex. C, at 2. As to their claim for tortious interference with their homeowner's insurance policy, the applicable law would be that of the state in which the subject contract (i.e., the insurance policy) was terminated or performance was to be expected. *See Ford Motor Co.*, 972 F. Supp. 2d at 856–60. Because Plaintiffs allege that Nationstar interfered with the policy through their local agent in Virginia, the law of that state should apply to that claim.

Finally, as to Plaintiffs' breach of contract claim, the Court will look to the agreement itself to determine the applicable law. *See Fed. Nat'l Mortg. Ass'n v. CG Bellkor, LLC*, 980 F. Supp. 2d 703, 710 (E.D. Va. 2013) (applying the parties' choice-of-law provision in the promissory note to determine the law governing that instrument). Because the mortgage agreement includes a choice-of-law provision stating that it would be governed by the law of the jurisdiction in which the property is located, Compl. Ex. A, at 13 ¶ 16, ECF No. 1-1, Plaintiffs' breach of contract claim should be evaluated under Delaware law.

C. *Res Judicata*

Nationstar contends that Plaintiffs' claims are barred by claim and/or issue preclusion pursuant to the Court's dismissal of their first case. "Under the doctrine of claim preclusion . . . 'a prior judgment bars the relitigation of claims that were raised *or could have been raised* in the prior litigation.'" *Serna v. Holder*, 559 F. App'x 234, 236–37 (4th Cir. 2014) (per curiam) (emphasis added) (quoting *Pittston Co. v. United States*, 199 F.3d 694, 704 (4th Cir. 1999)). Issue preclusion, on the other hand, "'precludes relitigation of issues of fact or law that are

identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate.” *Weinberger v. Tucker*, 510 F.3d 486, 491 (4th Cir. 2007) (emphasis added) (quoting *Va. Hosp. Ass’n v. Baliles*, 830 F.2d 1308, 1311 (4th Cir. 1987)). Because the effect of claim preclusion is broader in its sweep—potentially foreclosing this entire action—I will consider it first.

1. Claim Preclusion

A party can invoke claim preclusion, and thus avoid relitigation of an entire cause of action, if three elements are met:

1) the prior judgment was final and on the merits, and rendered by a court of competent jurisdiction in accordance with the requirements of due process; 2) the parties are identical, or in privity, in the two actions; and 3) the claims in the second matter are based upon the same cause of action involved in the earlier proceeding.

Serna, 559 F. App’x at 237 (quoting *Pittston*, 199 F.3d at 704). As to Plaintiffs’ claims against Nationstar (the only party invoking *res judicata*), the second element is easily satisfied because Plaintiffs and Nationstar are the same parties as in the previous action. *See Jones v. S.E.C.*, 115 F.3d 1173, 1180 (4th Cir. 1997) (“[T]he privity requirement assumes that the person in privity is ‘so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved.’” (quoting *Nash Cty. Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 493 (4th Cir. 1981))).

The third element—identity of causes of action—presents somewhat more difficulty. “[T]he appropriate inquiry to determine whether causes of action are identical for claim preclusion purposes is whether the claim presented in the new litigation ‘arises out of the same transaction or series of transactions as the claim resolved by the prior judgment.’” *Pittston*, 199

F.3d at 704 (quoting *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986)). The subject of this inquiry is “the ‘core of operative facts’ for the plaintiff’s claims and causes of action[], not the legal labels attached to them.” *Serna*, 559 F. App’x at 237 (quoting *Pueschel v. United States*, 369 F.3d 345, 355 (4th Cir. 2004)). In determining “whether the facts of the current and prior claims ‘are so woven together’ that they constitute a single claim,” the Court should consider factors such as “their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes.” *Pittston*, 199 F.3d at 704 (quoting Restatement (Second) of Judgments § 24 cmt. b (1982)).

Under this standard, I find that most of Plaintiffs’ claims against Nationstar fall under the same cause of action as those brought in the first suit. Although the legal theories and some factual details differ, the “core of operative facts” at the heart of both actions concerns Plaintiffs’ objections to Nationstar’s servicing of the mortgage on the Delaware residence. More specifically, both cases encompass such issues as whether Nationstar had the authority to establish an escrow account, whether it kept Plaintiffs properly apprised of the status of their payments, and whether it mishandled timely payments in order to assess unwarranted fees and “manufacture a default.” *Compare* R. & R. 2, *Hegedus I* (describing the broad categories of claims asserted by Plaintiffs in their first action), *with* Compl. 4–14 (describing Nationstar’s alleged misconduct in servicing the loan). This cause of action should encompass all of Plaintiffs’ claims against Nationstar except for their tortious interference claims, as those pertain to acts that occurred after the first action was dismissed.

Although the second and third elements of claim preclusion are met, I cannot say the same of the first—whether the Court’s judgment in the last case was final and on the merits.⁸ A dismissal under Rule 12(b)(6) for failure to state a claim is typically considered a final judgment

⁸ There is no dispute that the judgment was valid.

on the merits for purposes of res judicata. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981); *accord* Wright & Miller § 4439. This does not hold true, however, if the prior action was expressly dismissed without prejudice. *See Johnson v. O'Brien*, No. 7:09cv165, 2011 WL 11275, at *4 (W.D. Va. Jan. 3, 2011) (“A dismissal without prejudice is not a decision on the merits for purposes of res judicata.”).

Arguably, a judgment dismissing some counts with prejudice and others without prejudice might still have a claim-preclusive effect over any future complaint except to the extent that complaint reasserts one of the counts that was dismissed without prejudice. *See Perry v. PNC Bank, N.A.*, No. 5:16-CV-886-FL, 2017 WL 782294, at *2 (E.D.N.C. Feb. 28, 2017) (“[T]he court’s dismissal of the 2015 action constituted a final judgment on the merits except with respect to the sole claim dismissed without prejudice . . . and plaintiff does not assert his remaining available claim.” (citation omitted)). Here, the Court’s prior dismissal of some claims with prejudice would have the effect of barring any claim arising out of the same cause of action as in *Hegedus I*, except claims for fraud, violations of RESPA, or a certain violation of the FDCPA, as these counts were dismissed without prejudice in the first action. The circumstances of this matter, in which Plaintiffs never attempted to amend their *Hegedus I* complaint and instead filed a new action after waiting almost a year, might justify such a result, as Plaintiffs had ample opportunity to assert their claims in the first action. *See* Wright & Miller § 4439 (“Having brought suit, the plaintiff should be prepared to plead a valid claim, to persuade the court that amendment should be granted, to demonstrate valid reasons for dismissal without prejudice to a second action, or be barred.” (footnotes omitted)).

Nonetheless, I find that the more appropriate result is to conclude that the dismissal in *Hegedus I* was not final and on the merits for purposes of claim preclusion. Because the doctrine

concerns the finality of an entire cause of action, it makes sense that the first judgment should be final as to *all* counts arising under that cause of action in order for claim preclusion to take hold. Moreover, a fully preclusive result here would be overly harsh. Plaintiffs are pro se litigants, and the Court in *Hegedus I* did not expressly provide for outright dismissal with prejudice of the entire action if Plaintiffs failed to take further action or seek to file an amended complaint. Because the first action was not conclusively resolved in its entirety, I recommend that claim preclusion not apply here.

2. *Issue Preclusion*

On the other hand, it would be appropriate to apply issue preclusion in order to avoid relitigating particular questions that were conclusively resolved in the first case. A party seeking to invoke issue preclusion must establish the following elements:

(1) The party against whom [issue preclusion] is asserted must have been a party or in privity with the party in the prior action. (2) There must have been a final determination of the merits of the issues to be [precluded]. (3) The issues decided in the prior action must have been necessary, material, and essential to the prior case. (4) The party against whom [issue preclusion] is to be applied must have had a full and fair opportunity to litigate the issues. (5) The issues in the prior litigation must be identical to the issues sought to be [precluded].

Polk v. Montgomery Cty., 782 F.2d 1196, 1201 (4th Cir. 1986) (formatting modified). As with claim preclusion, the requirement of identity of the parties is easily satisfied here. The question of whether Plaintiffs had a “full and fair opportunity to litigate,” meanwhile, should be deemed satisfied unless they can point to unfairness or inadequacy in the prior litigation. *See Montana v. United States*, 440 U.S. 147, 163 n.11 (1979) (“Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.”); *accord* Wright & Miller § 4423. Plaintiffs have made no showing that the previous action was inadequately decided.

The more difficult task is identifying those issues that, in the first action, were finally determined on the merits, essential to the resolution of that case, and identical to issues presented in this case. One issue that easily meets these elements is the Court's determination that Plaintiffs failed to state a claim for intentional infliction of emotional distress. In the last action, the Court found that the Plaintiffs did not allege a sufficient level of outrageousness in Nationstar's conduct or that they suffered a significantly severe degree of emotional distress. *See* R. & R. 13, *Hegedus I*; Mem. Op. 11, *Hegedus I*. The Court's disposition of that claim can be considered final and on the merits, as it was dismissed with prejudice. Likewise, there is no question that resolution of that claim was essential to the Court's decision to dismiss Plaintiffs' first action. Finally, Plaintiffs' allegations in the present Complaint regarding this claim are not materially distinct from the allegations in their first complaint, as they merely allege again that Nationstar's supposed malfeasance (the nature of which is unchanged from the first action) caused them emotional harm. Accordingly, I find that issue preclusion bars Plaintiffs from bringing a claim against Nationstar for intentional infliction of emotional distress and recommend dismissal of that claim with prejudice.

By contrast, an issue that the Court did not conclusively resolve in the prior matter is whether Nationstar breached the terms of the mortgage. In his Memorandum Opinion, Judge Urbanski specifically considered whether, in light of the escrow waiver signed by Plaintiffs, Nationstar's subsequent creation of an escrow account to pay local property taxes constituted a breach. *See* Mem. Op. 16–17. He determined that Plaintiffs failed to adequately allege that Nationstar violated the agreement because they did not state that they had paid the taxes on time; thus, their complaint was insufficient to allege that Nationstar's creation of an escrow account was not in accordance with the waiver. *Id.* Notably, Judge Urbanski did not find that this

pleading defect was incurable, nor did it factor into his decision to dismiss some of Plaintiffs' claims with prejudice. In fact, he stated in a footnote that "even if plaintiffs had established that Nationstar had no right to establish an escrow account, an action for conversion would likely be more appropriate than" the other common-law claims they chose to pursue. *Id.* at 17 n.16. This language does not foreclose Plaintiffs renewing their allegation that the escrow account was created in violation of the terms of the mortgage, but would require that they do so under a different theory of liability. The Court's findings on this issue were therefore conditional, rather than "critical and necessary to the judgment," *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 327 (4th Cir. 2004) (quotation marks omitted).

A final issue over which the prior case's disposition has uncertain preclusive effect is the extent to which the mortgage agreement governed the relationship between Plaintiffs and Nationstar or provided Plaintiffs with a remedy for any breach. Relying on the Plaintiffs' allegations, the Court determined in the prior litigation that the mortgage terms created obligations for the parties. Such a finding was necessary to the Court's decision to dismiss Plaintiffs' unjust enrichment claim with prejudice. *See* R. & R. 13, *Hegedus I*; Mem. Op. 11 n.11, *Hegedus I*. Judge Urbanski expressly stated, however, that he was not deciding "whether the absence of direct privity of contract between plaintiffs and Nationstar would permit a properly pleaded fraud claim to go forward, despite the contractual nature of the parties' rights and responsibilities." Mem. Op. 11 n.10, *Hegedus I*. Thus, an appropriate reading of the prior case is that the Court did determine that the mortgage defined how Plaintiffs' loan payments were to be applied, but it did not decide whether Plaintiffs could enforce its terms against Nationstar in the event of a breach.

D. Merits

1. *Claims Against Conway*

Plaintiffs' claims against Conway are all without merit. Their allegations of professional misconduct all relate to representations made during the Delaware foreclosure proceeding; thus, any disputes as to the manner in which Conway conducted himself should be dealt with in that venue. As to the claims for defamation, Conway is protected from liability by absolute privilege for any statements "offered in the course of judicial proceedings so long as [he] shows that the statements [were] issued as part of a judicial proceeding and were relevant to a matter at issue in the case." *Barker v. Huang*, 610 A.2d 1341, 1345 (Del. 1992). Here, all of the allegedly defamatory statements were made in pleadings, docket entries, or other filings in the Delaware litigation, and were relevant to that action. Accordingly, Plaintiffs claims against Conway should be dismissed.

2. *Claims Against Nationstar*

a. *Tortious Interference with Contract*

Plaintiffs' claim against Nationstar for tortious interference with their homeowners' insurance contract is also meritless. In Virginia, a plaintiff must show four elements to state a claim for tortious interference with a contract:

(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.

Chaves v. Johnson, 335 S.E.2d 97, 102 (Va. 1985). Here, Plaintiffs have failed to allege damage resulting from Nationstar's purported interference with their insurance contract. They acknowledge that the insurance was reinstated, and the only consequence of the interference was that their relationship with their local agent became "strained," Compl. 12. A strained

relationship is insufficient to establish damages from tortious interference; accordingly, this claim should be dismissed.

b. Breach of Contract

Under Delaware law, “[i]n order to survive a motion to dismiss for failure to state a breach of contract claim, a plaintiff must establish (1) the existence of a contract; (2) breach of an obligation imposed by the contract; and (3) resulting damage to the plaintiff.” *Micro Focus (US), Inc. v. Ins. Servs. Office, Inc.*, 125 F. Supp. 3d 497, 500 (D. Del. 2015) (citing *VLIV Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)). Nationstar argues that it cannot be liable for a breach of the mortgage because it was not a party to that agreement. Federal courts have determined that “loan servicers are not in privity of contract with mortgagors where the servicers did not sign a contract with the mortgagors or expressly assume liability,” and “[t]hose courts have consistently found that ‘a servicer is not *automatically* in privity with a borrower where the servicer was not also the original lender.’” *Englert v. Nationstar Mortg., Inc.*, No. 1:15cv303, 2015 WL 9275662, at *3 (E.D. Va. Dec. 18, 2015) (quoting *Mazzei v. Money Store*, 308 F.R.D. 92, 109 (S.D.N.Y. 2015)).⁹ Under circumstances similar to this case, the court in *Englert* determined that “[a]s the loan servicer, Nationstar acts on behalf of [the successor lender] to collect payments on the loan; but lacking evidence of a contract creating legal obligations between Plaintiff and Nationstar, Nationstar is not in contractual privity with Plaintiff and therefore cannot be liable for breach of contract.” *Id.* at *4.

⁹ The breach of contract claims in *Englert* were governed under Virginia law, but the court there noted that the parties had not identified Virginia law directly addressing this particular issue. *Id.* The court therefore turned to *Mazzei* and other federal decisions for general principles. *Id.* at *3–4. I have not found any Delaware caselaw directly on point, but nothing suggests that Delaware law would command a different approach than that outlined in *Englert*, *Mazzei*, and other federal opinions.

Here, Plaintiffs have alleged that they entered into a mortgage contract with First Horizon and Nationstar “assumed serving” of the loan. Compl. 2. They further allege that a “mortgage contract exists between Plaintiffs and Nationstar” and that Nationstar, as an assignee of the mortgage agreement with First Horizon, acted “pursuant to the mortgage contract.” *Id.* at 7. Plaintiffs’ contention that a contract existed between them and Nationstar is a legal conclusion that is not entitled to any deference when considering a motion to dismiss. Moreover, Plaintiffs have not described the terms of the purported contract with Nationstar, and they did not attach it to the Complaint. As to the assertion that Nationstar was an assignee of the mortgage agreement (assuming that the existence of an assignment is an allegation of fact rather than law), Plaintiffs have described the nature and scope of the purported assignment in the vaguest terms, leaving the Court unable to determine whether Nationstar was assigned obligations to Plaintiffs under the mortgage agreement or only the right to collect payments. *See Englert*, 2015 WL 9275662, at *3 (citing *Mazzei*, 308 F.R.D. at 109) (“[A] borrower suing a loan servicer for breach of contract must establish their relationship and that the lender validly assigned some or all of its contractual obligations to the loan servicer.”). If Nationstar was not assigned obligations under the mortgage agreement, then its role would have been as an agent of the lender. *See Edwards v. Ocwen Loan Servicing, LLC*, 24 F. Supp. 3d 21, 28 (D.D.C. 2014). Under these circumstances, an action in contract would lie not against Nationstar, but against First Horizon or its successor as the principal. Accordingly, Plaintiffs’ allegations are insufficient to state a claim for breach of contract.

Nonetheless, I recommend that Plaintiffs be given an opportunity to amend this claim. In the prior case, the Court dismissed Plaintiffs’ unjust enrichment claim relying on their allegations that a contract governed the relationship between them and Nationstar. *See supra* Part II.C.2.

Moreover, Plaintiffs have adequately alleged the second and third elements of the claim, namely a breach of the escrow agreement and resulting damages. Thus, they should have another opportunity to present facts detailing the legal obligations owed by Nationstar and the source of those obligations.

c. Conversion

Alternatively, if Plaintiffs were not in contractual privity with Nationstar, then the Court can consider whether they have stated a claim for conversion.¹⁰ Under Texas law “[c]onversion is the unauthorized and wrongful assumption and exercise of dominion and control over the personal property of another to the exclusion of, or inconsistent with, the owner’s rights.” *Smith v. Maximum Racing, Inc.*, 136 S.W.3d 337, 341 (Tex. App. 2004). “An action will lie for conversion of money when identification of the money is possible and there is a breach of an obligation to deliver the specific money in question or to otherwise treat specific money.” *Sw. Indus. Inv. Co. v. Berkeley House Inv’rs*, 695 S.W.2d 615, 617 (Tex. App. 1985) (citing *Jones v. Hunt*, 12 S.W. 832, 833 (Tex. 1889)). “When a person has designated a particular use for proceeds from a check, those proceeds count as ‘specific money,’ capable of identification.” *Id.* Plaintiffs allege they tendered their payments to Nationstar with an understanding that those payments would be applied in the manner set forth in the mortgage agreement. Plaintiffs further allege that their monthly payments (that is, specific and identifiable money) were not treated in

¹⁰ Texas caselaw provides that “where a defendant’s conduct breaches an agreement between the parties and does not breach an affirmative duty imposed outside the contract, the plaintiff ordinarily may not recover on a tort claim if the damages are economic losses to the subject matter of the contract.” *Nat’l Union Fire Ins. Co. of Pittsburgh v. Care Flight Air Ambulance Serv., Inc.*, 18 F.3d 323, 327 (5th Cir. 1994) (citing *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986)). An action in tort is therefore not available if Plaintiffs and Nationstar were in privity of contract. On the other hand, if the parties were not in privity, the mortgage agreement still provided the manner in which Plaintiffs’ payments were to be applied, and thus violation of those terms could give rise to a tort claim.

accordance with the agreement. Thus, absent privity of contract, Plaintiffs have stated a claim for conversion under Texas law.

III. Conclusion

Plaintiffs' Complaint, ECF No. 1, fails to state any claim against Defendant Conway for which the Court can grant relief, and it likewise fails to state a claim against Defendant Nationstar for tortious interference with a contract. The Complaint, as drafted, also fails to state a claim for breach of contract, but it does state a claim for conversion. I therefore recommend that the presiding District Judge **GRANT** Conway's Motion to Dismiss, ECF No. 10, and **DISMISS** all claims against him **WITH PREJUDICE**. I furthermore recommend that Nationstar's Motion to Dismiss, ECF No. 6, be **DENIED** as to Plaintiffs' claim for conversion, **GRANTED IN PART, WITH LEAVE TO AMEND** as to the claim for breach of contract,¹¹ and **GRANTED** as to all other claims, with those claims being **DISMISSED WITH PREJUDICE**.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

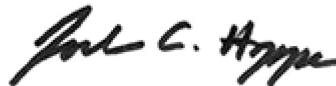
Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14 day period, the Clerk is

¹¹ Should the Plaintiffs elect to file an amended complaint, they are admonished to comply with Rule 8 of the Federal Rules of Civil Procedure.

directed to transmit the record in this matter to the Honorable Michael F. Urbanski, Chief United States District Judge.

The Clerk shall send copies of this Report and Recommendation to all counsel of record and unrepresented parties.

ENTER: February 1, 2018

A handwritten signature in black ink, reading "Joel C. Hoppe". The signature is written in a cursive, flowing style.

Joel C. Hoppe
United States Magistrate Judge